88-1886

No. ____

FILED
MAY 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the

Supreme Court of the United States

October Term, 1988

Johnnie Gilbert, et. al.,
Petitioners.

V.

City of Little Rock, et. al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VOLUME I

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QUESTIONS PRESENTED

I. Whether the U.S. Supreme Court decision in the case of *Crawford* precludes the award of expert witness expense in a Title VII or Civil Rights case under the Civil Rights Attorneys Fee Awards Act of 1976 (§1988).

II. Whether the ruling of the Eighth Circuit Court of Appeals that expert witness fees are not recoverable in a race discrimination case is in conflict with the decisions of other circuits and whether it is in conflict with decisions within the Eighth Circuit itself.

III. Whether the issue of expert witness fees is an important question of federal law which has not been but should be settled by the Supreme Court.

PARTIES INVOLVED

The parties involved in this petition are: Johnnie Gilbert, deceased; Horace Walters; Andrew Lockhart; Billy O'Donald; Julius Bryant; Jack Matlock; Maxie Alexander; Jessie Briscoe; Grady Anthony; Marcella Wilson; Larry Bazzelle, as Petitioners, and the City of Little Rock, Arkansas; the Civil Service Commission of the City of Little Rock, Arkansas; Walter E. "Sonny" Simpson; Carlton E. McMullin; Mahlon Martin and Susan Fleming, as Respondents.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES INVOLVED i

TABLE OF AUTHORITIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUES AND RULES INVOLVED 2

STATEMENT OF THE CASE 3

ISSUES 5

I. DOES THE UNITED STATES SUPREME COURT DECISION IN *CRAWFORD* PRECLUDE THE AWARD OF EXPERT WITNESS EXPENSE IN A TITLE VII OR, A CIVIL RIGHTS CASE INVOLVING THE CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT? 5

A. THE CASE OF *CRAWFORD* DOES NOT PRECLUDE THE PREVAILING PLAINTIFF OF A TITLE VII CASE OR A CIVIL RIGHTS CASE FROM AN AWARD OF EXPERT WITNESS EXPENSE UNDER §1988. 5

B. THE CONCURRING OPINION IN *CRAWFORD* SPECIFICALLY EXCLUDES §1988 FROM THE RULING. 6

II. THERE IS A CONFLICT WITHIN THE EIGHTH CIRCUIT AND THE OTHER, VARIOUS COURTS OF APPEAL. 6

III. THE ISSUE OF EXPERT WITNESS EXPENSE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT. 8

CONCLUSION 12

TABLE OF AUTHORITIES

CASES: Page

Black Grievance Committee v. Philadelphia Electric Corp., 47 FEP 215 (E.D. Penn. 1988) 7

Blum v. Stevenson, 465 U.S. 86, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) 9

Boring v. Kozakicwiky, 833 F.2d 468 (3rd Cir. 1987) 8

Chapparel v. Monsanto, 849 F.2d 1286 (10th Cir. 1988) 8

Crawford Fittings v. J.T. Gibbons, Inc., 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) 3

Dominic v. Hess Oil, 841 F.2d 513 (3rd Cir. 1988) 8

Dowdell v. City of Apopka, Florida, 698 F.2d 1181 (11th Cir. 1983) 7

ECOS, Inc. v. Brenigar, 671 F.Supp. 381 (M.D.N.C. 1987) 8

International Woodworkers of America v. Champion, 790 F.2d 1174 (5th Cir. 1986) 7

SapaNajin v. Gunther, 857 F.2d 463 (4th Cir. 1988) 8

Sevigny v. Dicksey, 846 F.2d 953 (4th Cir. 1988) 8

U.S. v. Yonkers Board of Education, 118 FRD 326 (S.N.D.Y. 1987) 7

STATUTES AND RULES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended; 42 USC §2000e 2

42 USC §1988 (1976) 2, 5

28 USC §1920 6

28 USC §1821 6

Rule 54(d), FRCP 5, 6

CONGRESSIONAL RECORD

H.R. Rep. 1558, 94th Congress, 2d Session (1976) 10

S. Rep. 1011, 94th Congress, 2d Session (1976) 10

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Petitioners, Johnnie Gilbert, et. al., respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on the 27th day of January, 1989.

OPINIONS BELOW

The opinion of the en banc Panel of the Court of Appeals issued on January 27, 1989, is set forth in Appendix A.

The Third Opinion of the Court of Appeals issued on January 27, 1989, is set forth in Appendix B.

The Fourth Opinion of the District Court issued on the 2nd day of August, 1988, is set forth in Appendix C.

The Third Opinion of the District Court issued on the 4th day of August, 1987, is set forth in Appendix D.

JURISDICTION

The Judgment of the en banc Court of Appeal for the Eighth Circuit, as well as the Panel of the Court of Appeals for the Eighth Circuit was decided and entered on the 27th day of January, 1989. The Petitioners requested an additional 30 days to file this Petition. This request was granted and Petitioners have been allowed to file their Petition on or before the 26th day of May, 1989. This Petition of Certiorari was filed within this time period. This Court's jurisdiction is invoked under 28 USC §1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Civil Rights Attorney's Fees Awards Act of 1976, 42 USC §1988 (1976):

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . , or Title VI of the Civil Rights Act of 1964 (42 USC 2000d, *et seq.*)
>
> The Court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

Civil Rights Act of 1964, §706 (k) as amended, 42 USC §2000 e-5 (k):

> In any action or proceeding under . . . (Title VII) the court, in its discretion, may allow the prevailing party . . . , a reasonable attorney's fee as part of the costs, ...

STATEMENT OF THE CASE

This case comes before this Court as a lawsuit filed by 12 black police officers from the Little Rock Police Department (LRPD). When initially filed in 1978, there were 14 black officers who worked for LRPD. At that time, only two blacks had ever been promoted within the LRPD promotion system—Grady Anthony and Clarence Hunter. Sergeant Anthony was a plaintiff in this case, and Clarence Hunter, who retired before the 1982 trial, testified on behalf of the plaintiffs.

At the first trial, the district court found that there was a prima facie case of disparate impact and disparate treatment; however, it ruled against the plaintiffs on the basis that the prima facie cases were rebutted by defendant's proof. On appeal, the 8th Circuit reversed and remanded, ordering the promotion system to be examined under close scrutiny. Particular emphasis was to be placed upon the blacks who had scored high on the written promotion exam yet low on the oral interview. Certiorari was denied, and a second trial was conducted in 1985. At that trial, the district court found that there was no discrimination, and again it ruled against the plaintiffs.

In a second appeal, the 8th Circuit ruled that the oral interview portion of the LRPD promotion system was discriminatory (lacking standards) and that it was being conducted in large part by white supervisors. Subsequently, a reconsideation for an en banc hearing was denied, and the corrective measures ordered by the 8th Circuit were implemented.

The plaintiffs filed a petition for fees and expenses and accepted the attorney's fees which were awarded. However, plaintiffs' expert witness expenses were drastically reduced by the district court from $93,000 to $900. This reduction was prompted by this Court's ruling in *Crawford Fitting v. J.T. Gibbons, Inc.*, 107 S.Ct. 2494, 96

L.Ed.2d 385 (June 15, 1987). Significantly, the district court ruled that in the absence of *Crawford*, it was inclined to award the "lion's share of the plaintiff's expert witness expense," but because of its interpretation of *Crawford*, it no longer possessed the authority to make such an award. (District Court opinion dated August 4, 1987, attached as Appendix D.)

An appeal was taken to the 8th Circuit Court of Appeals; ultimately, an en banc split decision (5/5) was reached, which disallowed the expert witness expense.

ISSUES

This case, if upheld on appeal, will result in the destruction of the law's intent under the Civil Rights Attorney's Fee Awards Act of 1976 (§1988). Due to disagreement among the various circuits, plaintiffs seek a Writ of Certiorari in order to resolve an important issue of civil rights laws.

I. DOES THE UNITED STATES SUPREME COURT DECISION IN *CRAWFORD* PRECLUDE THE AWARD OF EXPERT WITNESS EXPENSE IN A TITLE VII OR, A CIVIL RIGHTS CASE INVOLVING THE CIVIL RIGHTS ATTORNEY'S FEE AWARDS ACT?

In the Civil Rights Attorney's Fee Awards Act of 1976, Congress earmarked civil rights for special treatment under the law. In fact, the legislative history of §1988 reveals that two of the cases which Congress cited as the standards for interpreting the Act involve expert witness expenses.

A. THE CASE OF *CRAWFORD* DOES NOT PRECLUDE THE PREVAILING PLAINTIFF OF A TITLE VII CASE OR A CIVIL RIGHTS CASE FROM AN AWARD OF EXPERT WITNESS EXPENSE UNDER §1988.

Plaintiffs submit that the district court erred in holding that *Crawford* precludes expert witness expense under §1988. Although the Supreme Court has construed 54(d) as not granting the authority to go beyond the $30 a day limits of §1920 and §1821, the Attorney's Fee Award Act 42 USC (§1988) has not been so interpreted. Likewise, Title VII 42 USC §2000 e-5(k) has not been interpreted to place limits on expert witness expense. In enacting §1988, Congress did not try to narrow the

definition of costs, rather it left it open to be expanded on a case by case basis. After the court identifies a §1988 case, which explicitly authorizes "reasonable attorney's fees as part of costs," 54(d) is not applicable, and the award of attorney's fees in an appropriate case should include expert witness expense.

The *Crawford* decision states "without plain evidence of Congressional intent" to supercede §1821, 1920, and §54(d), the court should not exceed the limitations therein. Therefore, the *Crawford* decision does not preclude awarding expert witness expense in a situation where Congress' intent to allow expert witness expense is clear.

B. THE CONCURRING OPINION IN *CRAWFORD* SPECIFICALLY EXCLUDES §1988 FROM THE RULING.

Justice Blackmon in his concurring opinion points out that §1988 is not at issue in *Crawford* and that it should not be construed as being controlled by the decision *Crawford*, Supra. Apparently, either Justice Blackmon is saying that §1988 carries explicit authorization for expert witness expense or that the specific area of civil rights is excluded from this particular ruling. Significantly, the majority opinion did not controvert or deny Justice Blackmon's position in this matter.

II. THERE IS A CONFLICT WITHIN THE EIGHTH CIRCUIT AND THE OTHER VARIOUS COURTS OF APPEAL.

For over 15 years, the courts have historically embodied within their decisions the principle that expert witness fees are to be allowed and awarded in a §1988 case or civil rights case. Under §1988, Congress used the explicit statutory language of "reasonable attorney's fees as part of costs" because it was selecting the civil rights costs for different treatment under the law. The dissent in the 5th Circuit case giving rise to *Crawford*, *supra*, and

International Woodworkers of America v. Champion, 790 F.2d 1174 (5th Cir. 1986), pointed out that "circuit courts from every circuit in cases arising under §1988 have allowed the prevailing party to recover expert witness fees or other expenses of litigation not enumerated in §1920, either as costs or part of attorney's fees." In the case of *Dowdell v. City of Apopka, Fl.*, 698 F.2d 1181, 1188-92 (11th Cir. 1983), the 11th Circuit rejected any interpretation of reasonable costs which would penalize attorneys for undertaking civil rights litigation, stating "No one expects a policeman or office holder to pay for the privilege of enforcing the law" 122 Cong. Rec. 1,313 (1976) (remarks of Tunney).

In a post *Crawford* decision, the District Court of Pennsylvania ruled that *Crawford* does not apply to fees sought under §1988, because Congress "broadened attorney's fee awards through its enactment of §1988 and had not otherwise retracted, repealed, or modified the limitations on taxable fees . . . " *Black Grievance Committee v. Philadelphia Electric Company*, 47 FEP 215 (E.D. Penn. 1988). The *Grievance* court interpreted Congress to mean that the limitations of §1821 were repealed for purposes of §1988, and it cited Justice Blackmon's opinion for support.

In another post *Crawford* case, *U.S. Yonkers Bd. of Ed.*, 118 FRD 326 (S.D.N.Y. 1987), the Court, citing *Crawford* noted the crippling effect of limiting expert witness fees in §1988 cases. It stated that reimbursement for expert witness fees in suits of this nature is not unusual. Further, in light of the Congressional policy of encouraging the assertion of legal rights in civil matters and the adverse impact limitation on expert witnesses, it concluded that expert witness expense should not have a ceiling or limitation upon the fees.

Contrastingly, in some Circuit Court decisions since *Crawford*, there have been differing results on awarding expert witness expense. In the following cases expert witness expense has been limited:

1. *Chapparel v. Monsanto*, 849 F.2d 1286 (10th Cir. 1988);
2. *ECOS, Inc. v. Brenigar*, 671 F. Supp. 381, 404 n.12 (M.D.N.C. 1987);
3. *Dominic v. Hess Oil*, 841 F.2d 513, 517 (3rd Cir. 1988);
4. *Boring v. Kozakicwikz*, 833 F.2d 468, 474 (3d Cir. 1987);
5. *Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988).

Significantly, in the above cited cases, Title VII and §1988 issues are not specifically involved. Instead, these cases involve products liability, tort issues, stock fraud, medical treatment for pre-trial detainee, and the Equal Pay Act.

Further conflict on this issue is shown, in the 8th Circuit case of *SapaNajin v. Gunther*, 857 F.2d 463 (8th Cir. 1988) where an award of expert witness expense beyond the limitations imposed in the *Crawford* decision was allowed. This decision stands squarely in opposition to the 8th Circuit case now before this Court on petition for certiorari where expert witness expense was not allowed. Therefore, in addition to conflicting views from other Circuit Courts, a conflict of decisions within the 8th Circuit also exists.

III. THE ISSUE OF EXPERT WITNESS EXPENSE IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT

Congress, in an attempt to protect the civil rights of injured parties, provided that the prevailing party should recover "reasonable attorney's fees as part of costs" (§1988). In the Congressional Record, testimonies from several witnesses specifically address the issue of expert witness expense and identify it as an area of concern. Specifically, Senator Tunney, stated that he wanted to make sure that attorneys recover their necessary and incidential expenses related to litigation. Sen. Rep. No. 1011, 94th Cong. 2d Sess. 2 (1976). Additionally, Congressman Drennan stated in the

Congressional Record that the term "reasonable attorney's fees" should include "incidential and necessary expense" 122 Cong. Rec. 35, 123.

The exact method of calculating the attorney's fees was not provided in §1988. However, it is agreed that Congress authorized reasonable attorney's fees. Significantly, if expert witness fees are not recoverable, then the attorney's fees would be reduced by that amount; often this would not be reasonable, thus Congress' stated purpose would be thwarted.

Congress specifically chose a phrase with significance in civil rights litigation: "reasonable attorney's fees as part of costs." It carefully chose these words to accomplish its objectives and purposes, because this phrase had already been interpreted by the courts in civil rights law. Therefore, Congress' desire was to follow the precedent already established in civil rights litigation, and it brought forward into §1988 the prior judicial standards for interpreting attorney's fees as part of costs. This Court in the case of *Blum v. Stevenson*, 465 U.S. 86, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984) previously recognized this, stating "Congress directed that attorney's fees be calculated according to standards currently in use under other fee shifting statutes." Additionally, the Congressional Record itself makes the following statement:

> It is intended that the amount of fees awarded under §1988 be governed by the same standards which prevailed in other types of equally complex federal litigation, such as anti-trust cases, and not be reduced because the rights involved may be non-pecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express* . . . are correctly applied in such cases as *Stanford v. Gurcher*, 65 FRD 680 . . . *Davis v. County of Los Angeles*, 8 EPD §9444 . . . and *Swan v. Charlotte Mecklenburg Bd. of Ed.*, 66 FRD 483 . . . these cases have resulted in fees which are adequate to

> attract competent counsel but which do not produce windfall to attorneys.
>
> S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976).

As the above quote shows, Congress stated its intent to bring judicial interpretation of reasonable attorney's fees as part of costs into the Fee Awards Act. Significantly, two of the three cases which Congress recommended for interpreting this legislation granted expert witness expense. In fact, in *Davis, supra* at 5048, the Court specifically makes the statement in reference to expert witness fees: "These charges have not been challenged by defendants and are valid."

Congress was concerned about the ultimate destruction of the intent of critical civil rights legislation; therefore, its expressed purpose was to vindicate civil rights. Congress, in recognizing a need for protection of civil rights and a need for equal justice to all citizens, provided equal access to the courts. Sen. Rep. No. 94-1011, 94th Cong., 2d Sess., p. 3 (1976). Congress also recognized that in addition to equal access to the courts, there must be effective enforcement of civil rights laws and that in order to do this, there must be effective counsel. In order for Congress to provide equal access to the courts and effective enforcement of the civil rights laws, a "standard" had to be provided. Therefore, Congress accomplished this objective by bringing forth prior case law and by giving courts the discretion to interpret the attorney's fee statute:

> . . . Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course, by the case law interpreting similar attorney's fee provisions.
>
> H.R. Rep. 1558, 94th Cong. 2d Sess., 8 (1976)

Because the civil rights legislation passed by Congress since 1964 is dependent on equal access to the courts for enforcement, this case involves an important question of Federal law. The Civil Rights Attorney's Fee Awards Act of 1976 provides for equal access to the courts by allowing fees as part of costs to the prevailing party. Petitioners appeal to this Court for its assistance in interpreting this law. Regardless of the outcome of this litigation, determination by the U.S. Supreme Court is necessary in order to resolve these important issues for all people seeking to vindicate civil rights. This issue of expert witness expense in a civil rights case is an important question yet to be settled by this Court and this is the appropriate case for resolution.

CONCLUSION

Petitioners assert that it is proper at this time for this Court to consider the matter of expert witness expense in the civil rights case of *Gilbert*. The focus of this case now coming on before this Court involves the interaction of §1988 and FRCP §54(d), involving expert witness expense. There are no other issues involved on appeal in this case, and the trial court has previously ruled that the requested expert witness expense is reasonable by stating that "the lion's share" of the expense would be awarded absent *Crawford*. With this in mind, petitioners assert that the reasons for granting certiorari exist in this case including a conflict within the Eighth Circuit Court of Appeals itself. For these and the other reasons stated above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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